Reverting to the application proper before me, I am of the view that the Committee has made its determinations in relation to the second and the third charges and there is no necessity to stay the order of court of 7 March 1988. Neither is there a need to make any order in relation to the other prayers.

Order accordingly.

Solicitors: *Michael Khoo & BB Ong; YH Cheong.*

Reported by *Liu Hern Kuan*

DBS Finance Ltd v Prime Realty Pte Ltd & Ors and other actions

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NOS 1167 OF 1989, 1231 OF 1989 AND 1232 OF 1989
KARTHIGESU J
20 DECEMBER 1990

Land Law — Mortgage — Caveats — Application by mortgagee bank that intending purchasers of properties from mortgagor withdraw caveats lodged against mortgaged properties — Position of mortgagee vis-a-vis intending purchasers of property from mortgagor — Promissory and proprietory estoppel, acquiescence and specific performance

The first defendants entered into sale and purchase agreements to purchase five pieces of property in a condominium development from Prime Developments Pte Ltd ('Prime Developments'). The first defendants mortgaged the five properties to the plaintiffs by executing deeds of assignment of the sale and purchase agreements and mortgages-in-escrow of the said properties. The other defendants in each of the originating summons were the intending purchasers of three of the five properties from the first defendants, with whom the first defendants had entered into contracts of sale and purchase ('sub-contracts') and who had each lodged caveats against the respective properties.

The first defendants defaulted in payment of the monthly instalments payable to the plaintiffs. Legal proceedings were commenced against the first defendants on 10 July 1986 but judgment was entered against the first defendants only on 2 March 1987. At the date of commencement of this action, the sale of the mortgaged properties from Prime Developments to the first defendants had not been completed and Prime Developments remained the registered subsidiary proprietors of the mortgaged properties.

The plaintiffs commenced this originating summons seeking declarations that, inter alia, they were entitled to exercise their mortgagees' powers over the mortgaged properties and that the other defendants withdraw the caveats lodged against the mortgaged properties.

The sub-contracts had been entered into without the prior consent of the plaintiffs, and the first defendants had collected option moneys from the other defendants pursuant thereto. There were some exchanges of correspondence between the plaintiffs and the defendants' solicitors after the execution of the sub-contracts whereby the plaintiffs became aware of the sub-contracts, and the plaintiffs had in a letter consented to the sub-contracts and required the first defendants to pay all moneys from the sub-sales of the properties to the plaintiffs immediately. The other defendants argued, inter alia, that the plaintiffs in so giving their consent had acquiesced to the sub-contracts. The deposit moneys were paid to the plaintiffs by the first defendants but the sub-contracts were not completed.

Held, allowing the application:

(1) The plaintiffs were entitled to exercise their mortgagees' powers over the mortgaged properties and the caveats should be withdrawn.

(2) Following the execution of the mortgage documents by the first defendants, the first defendants retained only the equity of redemption in each of the mortgaged properties. The legal title in the mortgaged properties remained vested in Prime Developments and the equitable interest of the first defendants in the mortgaged properties had been assigned to the plaintiffs on the execution of the mortgage documents. The first defendants could only contract to sell to the other defendants their equity of redemption in the mortgaged properties.

(3) The plaintiffs had an untrammelled power of sale over the mortgaged property which would override any contracts of sale entered into by the first defendants.

(4) The defendants could not succeed in their arguments relating to promissory estoppel and acquiescence unless they had an interest in land within the meaning of s 104(1) of the Land Titles Act (Cap 157, 1985 Ed) so as to entitle them to maintain the caveats. The first defendants were not the registered proprietors of the mortgaged properties and had assigned their equitable interest in the mortgaged properties to the plaintiffs. Therefore the sub-contracts could not pass an 'interest in the land' to the other defendants so as to entitle them to lodge caveats, and all that each of the other defendants had was a contractual right against the first defendants to transfer the statutory title in the mortgaged properties to them when the first defendants were legally able to do so. Neither could the other defendants have specifically enforced the sub-contracts against the first defendants, as a court of equity would not have granted specific performance to the other defendants before the first defendants had wholly or partially redeemed the mortgaged properties because such order of specific performance would have destroyed the plaintiffs' security over the mortgaged properties.

Cases referred to

1 *Ong Eng Bing & Anor* v *Indian Overseas Bank* [1983] 1 MLJ 193 (folld)
2 *City Developments Ltd* v *Goh Yoke Hian & Ors* [1990] 3 MLJ 8 (folld)
3 *Duke* v *Robson* [1973] 1 All ER 481 (folld)
4 *Catchpole* v *Burke* [1974] 1 NZLR 266 (refd)
5 *Central Trust & Safe Deposit Company* v *Harvey G Snider & Ors* [1916] 1 AC 266 (refd)
6 *United Overseas Finance Ltd* v *Mutu Jeras* [1989] 3 MLJ 20 (distd)
7 *Kerabee Park Pty Ltd* v *Daley* [1978] 2 NSWLR 222 (folld)

Legislation referred to

Conveyancing and Law of Property Act (Cap 61, 1985 Ed) s 26(1)
Land Titles Act (Cap 157, 1985 Ed) ss 37, 104(1)
Land Transfer Act 1952 [NZ] s 41
Law of Property Act 1925 [UK] s 104(1)

Peter B Vijayan for the plaintiffs.
Tan Bar Tien for the defendants.

Cur Adv Vult

Karthigesu J: These three originating summonses were heard together.

DBS Finance Limited are the plaintiffs in the three originating summonses to whom Prime Realty Pte Ltd, the first defendants in all three, mortgaged five properties, namely, 97A (the subject matter in OS No 1167 of 1989), 99A (the subject matter in OS No 1231 of 1989), 101A (the subject matter in OS No 1232 of 1989), 97B and 99B Toh Yi Court ('the mortgaged properties'). The other defendants in each of the three originating summonses are the intending purchasers from the first defendants of the mortgaged property, the subject matter of the particular originating summons, with whom the first defendants had entered into contracts of sale. The other two mortgaged properties are not the subject matter of any proceedings since the first defendants had not contracted to sell them.

The first defendants did not enter an appearance and were unrepresented at the hearing. All the other defendants were represented by the same counsel, Mr Tan Bar Tien.

The facts common to all three originating summonses

On 31 May 1984, the first defendants entered into five sale and purchase agreements to purchase each of the five mortgaged properties from Prime Developments Pte Ltd ('Prime Developments') in a condominium development known as Toh Yi Court Condominium which Prime Developments were then in the course of developing. Prime Developments are or were a wholly owned subsidiary of the first defendants.

On 1 November 1984, by a deed of assignment and a mortgage-in-escrow executed contemporaneously therewith and pending the completion of the sale of the mortgaged properties by Prime Developments to the first defendants, and in consideration of the plaintiffs agreeing to lend to or advance for the benefit of the first defendants sums of money not exceeding $2.23m, the first defendants mortgaged the mortgaged properties and assigned to the plaintiffs all their rights, title, interest, etc which the first defendants had under their sale and purchase agreements with Prime Developments as well as all the estate, rights, title and interest of the first defendants in the mortgaged properties.

The plaintiffs lodged a caveat, CV/09162A, in protection of their interest as mortgagees against all five mortgaged properties on 2 November 1984 and an 'extension caveat' was lodged on 26 October 1989 bearing the same number.

It is not disputed that the combined effect of the deed of assignment, the mortgage-in-escrow and the memorandum of mortgage referred to in the mortgage-in-escrow ('the mortgage documents') is that all unpaid balances become immediately payable by the first defendants upon default of any monthly instalment; that the statutory power of sale is exercisable without any restriction imposed by s 25 of the Conveyancing and Law of Property Act (Cap 61, 1985 Ed); that no sale of any one of the mortgaged properties may be effected by the first defendants without the prior written consent of the plaintiffs; and that any delay or indulgence on the part of the plaintiffs in exercising their rights shall not amount to condonation or acquiescence or a waiver of the plaintiffs' rights of action.

In December 1984, the first defendants defaulted in the payment of the monthly instalments of the principal sum advanced and interest and accordingly the plaintiffs became entitled to enforce their rights under the mortgage and to sell the mortgaged properties as mortgagees. The plaintiffs did not, however, commence legal proceedings against the first defendants until 10 July 1986 and not until 2 March 1987 did they enter judgment against the first defendants, inter alia, for $1,919,471.83; for interest on the sum of $1,844,504.93 at the rate of 7.75 per cent per annum from 12 June 1986 until judgment; for delivery of vacant possession of the mortgaged properties; and for the sale of the mortgaged properties (Suit No 4082 of 1986).

As at the date of the judgment, the sale of the mortgaged properties by Prime Developments to the first defendants had not been completed. There was still 20% of the purchase price payable by the first defendants to Prime Developments on each of the mortgaged properties. Furthermore no strata certificates of title had been issued. The strata certificates of title in respect of the three mortgaged properties, the subject matter of these proceedings, were issued on 7 May 1987 and the subsidiary proprietor named in each of them was Prime Developments who were still the registered subsidiary proprietors of the mortgaged properties when the plaintiffs commenced Originating Summons No 1167 of 1989 on 6 December 1989 and Originating Summons Nos 1231 of 1989 and 1232 of 1989 on 30 December 1989.

I shall now set out the facts with special reference to Originating Summons No 1167 of 1989 and later deal with such of the facts applicable to the other two originating summonses as are different.

Originating Summons No 1167 of 1989

On 29 October 1986, after the commencement of Suit No 4082 of 1986 but before judgment, the first defendants without the knowledge and prior written consent

of the plaintiffs granted an option to the second and third defendants exercisable by 4pm on 12 November 1986 to purchase the mortgaged property No 97A at the price of $330,000. The purchase, by the terms of the option was to be completed within twelve weeks of the date of the option. The option money of $3,000 which was paid was liable to forfeiture if the option was not exercised within the stipulated time.

On 13 November 1986, that is to say one day after the option had expired, it not having been exercised within the stipulated time, the then solicitors for the second and third defendants inquired of the first defendants' solicitors whether the prior written consent of the plaintiffs had been obtained and expressed their view that if no consent had been obtained the option was bad in law and required the immediate return of the $3,000 unless the first defendants' solicitors could get the plaintiffs to ratify the option. Also, on the same day, the solicitors for the second and third defendants addressed the plaintiffs' solicitors sending a copy of the option above referred to and inquired whether the plaintiffs will consent to the proposed sale.

On 20 November 1986, the first defendants' solicitors informed the plaintiffs' solicitors that the first defendants had granted an option to a purchaser to sell the mortgaged property No 97A for $330,000 and requested for the plaintiffs' immediate written consent.

The plaintiffs' solicitors replied to the first defendants' solicitors on 24 November 1986 which letter they copied to the second and third defendants' solicitors. Their reply was not with reference to the mortgaged property No 97A but with reference to all five mortgaged properties, and after observing that the plaintiffs' written consent was not obtained before the first defendants purported to sell the mortgaged properties, continued as follows:

> As the combined sale prices of the said mortgaged properties (it must be observed that similar requests for written consent in respect of the mortgaged properties 99A and 101A had also been received by then) are insufficient to redeem the mortgage, our clients cannot be expected to consider whether or not to give their said consent or to discharge the said mortgage unless your clients are able to meet the shortfall as well. If your clients are able to do so, please let us have detailed particulars as to how they will fully redeem the said mortgage.
>
> However, strictly without prejudice to any of our clients' rights as mortgagee, we shall shortly be forwarding to you our clients' redemption statement for the said mortgage.

The redemption statement as at 13 February 1987 was duly sent to the first defendants' solicitors on 18 December 1986.

Following a telex message from the first defendants' solicitors to the plaintiffs' solicitors on 22 December 1986 requesting for the plaintiffs' consent to the sale of all five mortgaged properties and for the title deeds relating to the mortgaged properties for onward transmission to the first defendants' purchasers' solicitors and a complaint that some of the purchasers had indicated that they did not wish to proceed with the purchase in view of the delay, the plaintiffs' solicitors having already forwarded the title deeds as requested addressed the first defendants' solicitors on 27 December 1986, inter alia, as follows:

> Please note that, as stated in our facsimile letter of 24 November 1986, our clients' written consent to any of the sales of the said properties was not sought, nor was it obtained, by your clients before they purported to sell the same.
>
> Notwithstanding this, our clients are prepared to give a full discharge for each of the said properties upon payment of the following respective sums on or before 13 February 1987.

Unit	Amount
97A	$ 406,132.26
97B	$ 406,132.26
99A	$ 406,132.26
99B	$ 406,132.27
101A	$ 406,132.27
	$2,030,661.32

There appears to have been no response from the first defendants' solicitors to the plaintiffs' solicitors' proposal as stated above. Accordingly as previously noted, the plaintiffs proceeded to judgment in Suit No 4082 of 1986 on 2 March 1987 and on the same day addressed the first defendants' solicitors in the suit (different from the solicitors acting in the sale of the mortgaged properties) that they were amenable to the first defendants proceeding with the sale of the mortgaged properties Nos 97A, 99A and 101A, the only ones contracted to be sold, provided that:

> (A) all moneys paid in respect of each property be paid to our clients immediately, this includes option fees and deposits, and
>
> (B) your clients give a satisfactory scheme for meeting the shortfall.

In the same communication the first defendants were advised that no further options or contracts should be entered into without the prior written consent of the plaintiffs.

The first defendants' proposal to pay the shortfall by 24 monthly instalments together with interest was rejected by the plaintiffs on 7 April 1987. In the meanwhile, the second and third defendants who had remained quiet since 24 November 1986 showed interest again and on 14 March 1987 inquired of the first defendants' solicitors whether the first defendants were in a position to proceed with the sale, otherwise they wanted the return of the $3,000 option money. Not getting a reply, the second and third defendants' solicitors wrote

again to the first defendants' solicitors on 30 March 1987, which letter they copied to the plaintiffs' solicitors, stating that the second and third defendants did not wish to proceed with the sale and demanded the return of the $3,000 option money and threatened legal proceedings for the recovery of the same if it was not returned within seven days.

On 7 May 1987, following direct negotiations between the plaintiffs and the first defendants, the first defendants telexed the plaintiffs' confirmation of the matters discussed between them as follows:

(1) After checking with our solicitor, Jing Quee, Chin Joo and Teck Hui, the details below are confirmed correct:

Collateral	Status	Deposits
97A Toh Yi Ct	Sold $300,000	$3,000 received by PR with solicitor
97B Toh Yi Ct	Unsold	
99A Toh Yi Ct	Sold $335,000	1% received — with solicitor
99B Toh Yi Ct	Unsold	
101A Toh Yi Ct	Sold $338,000	10% received — with solicitor

(2) Instructions have already been given to solicitor to inform the purchasers to proceed ahead with the completion of these sales and all deposits paid so far will be paid to DBS Finance.

(3) We are selling the remaining two units at $375,000 minimum each and steps are being taken to market them through our sale agents.

(4) We also confirm that the project at Toh Yi Ct has already been completed awaiting the imminent issue of strata titles from the Registry of Titles. All procedures to applications have been made sometime ago. No further fund is necessary for the completion of project.

(5) Hence the remaining portion of the loan facility amounting to approximately $496,000 which was not released will no longer be necessary. We agree that this unreleased amount be cancelled.

(6) As such, we would arrive at a shortfall of approximately $230,000 still outstanding. We would propose to settle these amounts by the Co and Mr Ko Oon Soon in the manner of monthly instalment of $10,000 each until the total amount is fully paid.

On 21 May 1987, the plaintiffs through their solicitors informed the first defendants' solicitors that consent had been given to the first defendants for the sale of the three mortgaged properties, the subject matter of these proceedings. This letter reads as follows:

Re: Nos 97A, 99A and 101A Toh Yi Court

We refer to your letter of 14 May 1987.

We would inform you that our clients have consented to the sale of the above properties by your clients subject to the full purchase prices as follows being paid to our clients.

(1) No 97A Toh Yi Court — $330,000
(2) No 99A Toh Yi Court — $335,000
(3) No 101A Toh Yi Court — $338,000

Our clients further require all moneys which has been received in respect of the sales of the aforesaid properties (option/deposit moneys) to be paid to them immediately.

Our clients shall upon receiving the full purchase prices as aforesaid discharge the aforesaid properties from the mortgage.

Kindly let us know the dates of completion for the sales of the aforesaid properties.

Kindly inform your clients that our clients' prior written consent is also required for the sales of Nos 97B and 99B Toh Yi Court.

On 11 June 1987, the first defendants' solicitors forwarded the $3,000 option money which the first defendants had previously received. On 16 July 1987, they informed the plaintiffs' solicitors that the option had been duly exercised on 10 July 1987 and forwarded the balance of the 10% deposit in the sum of $30,000.

It will be remembered that on 13 November 1986, the second and third defendants' solicitors had forwarded a copy of the option dated 29 October 1986 which the first defendants had granted to the second and third defendants and which as stated above was exercised on 10 July 1987. It is pertinent to note that on 9 July 1987 and with the consent of the first defendants but without the consent or knowledge of the plaintiffs, the fourth defendant had been substituted for the third defendant.

On 22 July 1987, the second and fourth defendants who were now the intending purchasers of the mortgaged property No 97A lodged caveat CV/46137A against this mortgaged property. It is interesting to note that the interest claimed is as purchasers and the ground of the claim is the option dated 29 October 1986 which is stated to be between the registered proprietor, namely, Prime Developments and the caveators. Further the only caveatee named is the first defendants.

Between 10 July 1987 and the 2 November 1988, despite several letters addressed to the first defendants' solicitors for information as to the completion date, there was total and absolute silence from the first defendants and/or their solicitors except for one letter dated 1 August 1987 in which the first defendants' solicitors informed the plaintiffs' solicitors that the completion dates not only of the mortgaged property No 97A but also of the other two mortgaged properties in question, namely, Nos 99A and 101A had not been finalized but would inform the plaintiffs' solicitors when finalized.

Accordingly on 2 November 1988 and not having heard further from the first defendants and/or their solicitors and for that matter from the second and third defendants as to the position they took in regard to their contract with the first defendants, the plaintiffs through their solicitors gave notice to the first defendants' solicitors as well as to the second and third defendants'

solicitors of their intention to exercise their rights under the mortgage including their power of sale and requested the second and third defendants to withdraw caveat CV/46137A.

Another nine months was to lapse before any response of any kind was received and that only from the second and third defendants, the first defendants seemingly, having removed themselves from the scene altogether. The response was to inform the plaintiffs' solicitors that the second and third defendants (no mention of the fourth defendant) had now engaged new solicitors in place of their former solicitors.

On 16 August 1989, the plaintiffs' solicitors repeated to the second and third defendants' new solicitors what they had said on 2 November 1988, that they were going to exercise their power of sale and gave a final notice to withdraw caveat CV/46137A by 21 August 1989.

For the first time the second and third defendants (not the fourth defendant) through their new solicitors' letter to the plaintiffs' solicitors dated 25 November 1989 revealed their stand. It was that since the plaintiffs had already consented to the sale of the mortgaged property No 97A to the second and third defendants, the plaintiffs were not entitled to exercise their power of sale. Reliance was placed on the plaintiffs' solicitors' letter to the first defendants' solicitors dated 21 May 1987 which has already been set out in full earlier. A further point mentioned in this letter was that the plaintiffs, by a deed of assignment dated 3 December 1987 entered into with Prime Developments, had obtained the assignment to them of the balance 20% of the original sale price of the mortgaged property No 97A of which notice was given to the second and third defendants and accepted by them. Accordingly it was said that the plaintiffs were entitled to and empowered to execute the transfer both as attorney of the first defendants and Prime Developments. The plaintiffs were urged to complete the sale to the second and third defendants (not the fourth defendant) on this basis and on the second and third defendants (not the fourth defendant) paying over to the plaintiffs the balance of purchase price under the option/agreement dated 29 October 1986.

Before proceeding further with a narration of the facts, I should pause here to consider the terms of the deed of assignment dated 3 December 1987 above referred to. The assignment was of the balance of the 20% of sale price of each of the mortgaged properties sold by Prime Developments to the first defendants and which was payable to Prime Developments either by the first defendants or any purchasers from the first defendants of the mortgaged properties with the consent of the plaintiffs to complete the sale by Prime Developments. The power of attorney given to the plaintiffs by this deed of assignment to act in the name of Prime Developments was consequent on a breach of the terms and conditions contained in the deed and upon Prime Developments receiving the said 20% which they were obliged to pay into a special account opened at the DBS Bank, Shenton Branch for that purpose. It does not in my view give the plaintiffs an unrestricted power to act in the name of Prime Developments nor does it give any authority to the plaintiffs to act in the name of the first defendants who were not parties to the said deed of assignment. I therefore conclude that the second and third defendants' solicitors were wrong in the view they expressed in their letter to the plaintiffs' solicitors dated 25 August 1989. This deed of assignment need not be considered any further.

To return to the facts, the plaintiffs' solicitors did not agree with the position taken by the second and third defendants' solicitors in their letter of 25 August 1989 and said so in their letter to the second and third defendants' solicitors dated 4 September 1989. The plaintiffs' solicitors, however, suggested that the plaintiffs would be prepared to consider discharging the mortgage over the mortgaged property No 97A if the second and third defendants would redeem the mortgage on behalf of the first defendants which did not include the 20% of the sale price payable by the first defendants to Prime Developments which had been assigned to the plaintiffs.

I understood that to mean that what the plaintiffs wanted was a payment of one-fifth of all moneys due to the plaintiffs from the first defendants under the mortgage in return for which the plaintiffs would release the mortgaged property No 97A from the mortgage.

The second and third defendants' solicitors did not agree to this proposal and on 10 October 1989 issued a writ in Suit No 1881 of 1989 claiming an injunction to stop the plaintiffs from proceeding with the auction of this mortgaged property scheduled for 12 October 1989. The application for an interim interlocutory injunction was not proceeded with as on 11 October 1989, the plaintiffs and the second and third defendants (not the fourth defendant) agreed that the auction will be proceeded with on mutual undertakings that the second and third defendants (not the fourth defendant) will take out an application to court to determine their rights against the plaintiffs and the plaintiffs will take out an application to court against the second and fourth defendants for the removal of caveat CV/46137A. The plaintiffs have commenced such proceedings, namely, these but the second and third defendants have not.

The auction was duly held on 12 October 1989 and the mortgaged property No 97A sold to the third defendant as the highest bidder for $465,000.

The day following the auction on 13 October 1989, the second and third defendants, for reasons I do not altogether understand, filed caveat CV/6652B claiming an interest against the mortgaged property No 97A by virtue of the option dated 29 October 1986 granted to them by the first defendants and purported to have been exercised on 10 July 1987.

Yet another caveat CV/45313B was lodged by the second and fourth defendants on 21 November 1990, during the hearing of these proceedings, claiming the same interest as for caveat CV/46137A lodged on 22 July 1987 presumably to overcome the errors of description contained in that caveat.

One of the special conditions of the auction above referred to was that in the event the plaintiffs are unable to obtain the withdrawal of caveats lodged against the mortgaged property No 97A by the date of completion or any extended period of completion, the sale and purchase concluded at the auction shall be null and void. I am informed that the third defendant with whom the auction contract was concluded as the highest bidder of the mortgaged property No 97A has not agreed to an extension of time for completion although the hearing of these proceedings had not been concluded and notwithstanding that he has taken an active part in these proceedings. Accordingly his contract to purchase the mortgaged property No 97A is now considered to be null and void.

Originating Summons No 1231 of 1989

The facts relating to this originating summons differ from the facts set out under the heading Originating Summons No 1167 of 1989 only in the following respects. In all other respects those facts apply equally to this originating summons.

The first defendants, without obtaining the prior written consent of the plaintiffs for the sale of the mortgaged property No 99A, entered into an agreement for its sale and purchase with the second and third defendants on 4 October 1986 at the price of $335,000 who then paid a deposit of $3,350 to the first defendants. This payment was handed over to the plaintiffs at the same time as the payments in respect of the mortgaged property No 97A were handed over. The date of completion was fixed for three-and-a-half months from the date of the agreement. A caveat CV/33703A was duly lodged claiming an interest as purchasers under the agreement.

On 28 October 1986, the first defendants' solicitors wrote to the plaintiffs' solicitors giving notice that the first defendants wished 'to redeem the mortgage of the above property as they have already sold same'. The reference to the 'above property' was to the mortgaged property No 99A. That same letter also asked for the redemption statement and the title deeds to enable the draft discharge to be prepared.

This letter is forthright in its terms. There is no semblance of a request for written consent to sell or to ratify the agreement to sell. Not surprisingly the plaintiffs' solicitors did not reply. The first defendants' solicitors wrote again to the plaintiffs' solicitors on 12 November 1986 and this time forwarded to them a copy of the agreement for sale dated 4 October 1986. The plaintiffs' solicitors responded on 24 November 1986 as they had in connection with the mortgaged property No 97A to which I have already referred to earlier.

It was only on 22 December 1986 that the first defendants' solicitors did in fact request for the plaintiffs' consent to sell the mortgaged property No 99A. There then followed a series of correspondence between 27 December 1986 and 18 November 1988 in terms identical with what I have previously stated, except that in this case the second and third defendants, being aware of the negotiations between the plaintiffs and the first defendants over the question of a shortfall, offered on 4 March 1987 to buy the mortgaged property No 99A under a mortgage sale in the event the negotiations broke down.

As in the case with the mortgaged property No 97A, there was complete silence from the first defendants and the second and third defendants or their respective solicitors until 27 July 1989 when the second and third defendants changed solicitors and began to be represented by the same solicitors as the second, third and fourth defendants in OS No 1167 of 1989. Not surprisingly again, the stand taken by these defendants from and after 27 July 1989 was the same as that taken by the defendants in OS No 1167 of 1989.

On 4 July 1989, the plaintiffs had entered into an agreement with Seng Hin Sawmill Company (S) Pte Ltd for the sale of the mortgaged property No 99A for $430,000. This agreement contained a provision which was later to be adopted in the auction of the mortgaged property No 97A and that is that in the event the plaintiffs were unable to obtain the withdrawal of caveats lodged against the mortgaged property No 99A by the date of completion or any extended period of completion, the sale and purchase shall be null and void.

I am informed that Seng Hin Sawmill Company (S) Pte Ltd have agreed to extend the date of completion to 31 December 1990.

Again as in the case with OS No 1167 of 1989, these defendants issued a writ in Suit No 1880 of 1989 claiming an injunction to restrain the plaintiffs from completing the sale of the mortgaged property No 99A to Seng Hin Sawmill Company (S) Pte Ltd, and as in the case of Suit No 1881 of 1989, the matter was not

proceeded with on the same mutual undertakings. The plaintiffs have commenced these proceedings for the removal of caveat CV/33703A but these defendants have not commenced any proceedings to determine their rights against the plaintiffs.

Originating Summons No 1232 of 1989

The facts in this originating summons differ from the facts in the other two originating summonses only as stated hereafter. The option for the sale of the mortgaged property No 101A at a price of $338,000 was granted to these defendants on 25 October 1986. The option was exercised on 7 November 1986 and 10% of the purchase price in the sum of $33,800 duly paid to the first defendants was handed over to the plaintiffs at the same time as in the case of the other two mortgaged properties. A caveat CV/55908A was duly lodged claiming an interest as purchasers under the agreement.

On 4 April 1988, these defendants obtained an order for specific performance against the first defendants in Suit No 186 of 1988 and in default thereof for leave to enter judgment, inter alia, for damages. At no time thereafter did these defendants seek to enforce the order; nor did they seek to enter judgment against the first defendants for damages.

On 29 November 1989, the plaintiffs entered into an agreement to sell the mortgaged property No 101A jointly to Tan Soon How and Chew Moy Kian alias Eileen Chew for $460,000. As in the case of the mortgaged property No 99A, this agreement of sale had a similar provision that the agreement would be null and void in the event the plaintiffs failed to get withdrawal of the caveats before the date of completion or any extended period of completion. These purchasers have also agreed to extend the date of completion to 31 December 1990.

The action commenced by these defendants in Suit No 1882 of 1989 to prevent the plaintiffs from completing the sale was not proceeded with on the same mutual undertakings as before and again, as before, the plaintiffs have commenced these proceedings for the removal of caveat CV/55908A but these defendants have not commenced any proceedings to determine their rights against the plaintiffs.

The remedies claimed by the plaintiffs

The remedies claimed in each of the three originating summonses are identical in nature and can be stated generally as follows:

Firstly, a declaration that the plaintiffs as mortgagees of the mortgaged properties in question and pursuant to the order of court dated 2 March 1987 obtained in Suit No 4082 of 1986 are entitled to exercise their mortgagees' powers over the said mortgaged property, in particular, their power of sale and to obtain possession of the said mortgaged property for the purposes of such sale freed from any contract of sale and purchase entered into by the first defendants.

Secondly, a declaration that upon the plaintiffs' exercise of their mortgagees' power of sale over the said mortgaged property by entering into a contract for sale and purchase, the first defendants are not entitled to redeem the said mortgaged property.

Thirdly, an order that the purchasers from the first defendants are to totally withdraw the caveats lodged by them in the Registry of Titles against the said mortgaged properties by executing and lodging a duly stamped instrument of withdrawal of caveat within seven days from the date of such order. These are caveats CV/46137A in respect of the mortgaged property No 97A; CV/33703A in respect of the mortgaged property No 99A; and CV/55908A in respect of the mortgaged property No 101A.

I have set out the facts relating to the mortgaged properties in question in some detail as the remedies claimed by the plaintiffs, in particular the order for the removal of the caveats in question, are resisted on the equitable principles of waiver/estoppel, acquiescence and delay.

The foregoing facts are not seriously disputed by the defendants, the purchasers of the mortgaged properties in question from the first defendants, to whom I shall refer hereafter, collectively, as 'the defendants'.

It cannot be disputed that, following the execution of the mortgage documents, only the equity of redemption of the mortgaged properties in question reposed in the first defendants. It must follow that what the first defendants contracted to sell to the defendants was that equity of redemption alone. The first defendants on the dates of the contracts of sale with the defendants did not have vested in them any estate, be it legal or equitable, in the mortgaged properties. The legal estate in the mortgaged property still remained vested in Prime Developments and the equitable estate of the first defendants had been assigned to the plaintiffs on the execution of the mortgage documents. If any authority is needed for this proposition I find it in *Ong Eng Bing & Anor* v *Indian Overseas Bank*[1] and in *City Developments Ltd* v *Goh Yoke Hian & Ors*[2] where Chan Sek Keong J held that an assignor who had executed a deed of assignment in favour of an assignee had only an interest comprising an equity of redemption in the property as the assignor's right, title and interest in the property has been assigned to the assignee.

The plaintiffs undoubtedly had an untrammelled power of sale over the mortgage properties. This power

of sale could not in any circumstances be overridden by the contracts of sale the first defendants entered into with the defendants. In *Duke* v *Robson*,[3] a case in which the facts have striking similarities with the facts in these originating summonses it was held that a contract for sale by a mortgagor of the equity of redemption could have no possible effect on the rights and powers of a mortgage, in particular the right of the mortgagee to exercise his power of sale, any more than could a conveyance by a mortgagor, unless in the course of completion the mortgage was redeemed. At first instance Plowman J said at p 485 of the report:

> That was all they (the mortgagors) had to sell, an equity of redemption. The equity of redemption, together with the plaintiffs' (the purchasers from the mortgagors) interest in it under their contract with the mortgagors, is in my judgment overridden under the overriding powers of a mortgagee contained in the Law of Property Act 1925.

After referring to s 104(1)of the Law of Property Act 1925 which is in pari materia with s 26(1) of the Conveyancing and Law of Property Act (Cap 61, 1985 Ed), he proceeded as follows:

> The effect of these provisions, as I have indicated in my judgment, is that a sale by a mortgagee under a charge by way of a legal mortgage overreaches the equity of redemption and all rights subsisting in that equity, including the right of a purchaser from the mortgagor and notwithstanding that he may have registered an estate contract in respect of his contract of sale.

Plowman J was upheld in the Court of Appeal. In the course of delivering the main judgment Russell LJ at p 488 of the report said this, which in my view is particularly apposite in this case:

> It was further sought to be argued (although the facts here are not in accordance with it) that if such information as to a contract is given before the mortgagee purports to exercise his power to sell, and in particular when the proposed purchaser from the mortgagee has notice (owing to the registration of the land charge) then neither that purchaser nor the mortgagee is in a position to complain if the contract provided for enough purchase price to satisfy all the incumbrances. I should not be prepared to accept that proposition even if it fitted the facts of this case (which it does not) because it cannot possibly be said that a mortgagee is deprived of his power to sell by the fact that there is a contract which may be specifically enforceable, may be for enough to pay off all the incumbrances, but which is still in the field of contract and may not come to the stage of completion. I see no ground in principle or equity for saying that this would deprive a mortgagee of the right to exercise a power to sell; and so a fortiori if the only contract of which the mortgagee is given information is one which does not on the face of it provide a sufficient purchase price for the payment off of the incumbrances.

Again at p 488 of the report Russell LJ said:

> One has only, as a test, to ask oneself the question: what has happened in this case in any way to cut down the rights and powers of sale of the mortgagees? In my opinion, nothing has happened. All that has happened is that the mortgagor has contracted with somebody else to sell the equity of redemption; and I do not see any ground in principle, equity or otherwise for saying that somehow that puts the person to whom the mortgagor has contracted to sell the equity of redemption in a better position vis-a-vis the mortgagees and their power of sale than, say, the mortgagor himself or herself.

The fact that in the instant originating summonses the first defendants had only an equitable estate in the mortgaged properties which they mortgaged to the plaintiffs does not alter the ratio of *Duke* v *Robson*.[4] See *Croft on The Mortgagees' Power of Sale* para 16 of p 15.

The defendants argue that the plaintiffs waived their power of sale when they gave the first defendants their consent to sell the mortgaged properties in question by the plaintiffs' solicitors' letter dated 21 May 1987, the full text of which I have set out earlier in this judgment. The argument goes something like this. When the plaintiffs gave their consent, they knew the prices at which each of the mortgaged properties would be sold and to whom. They had insisted on and had received from the first defendants' solicitors the deposits paid by the defendants. They agreed that on receipt of the full purchase prices they would discharge the mortgaged properties in question from the mortgage. Accordingly the plaintiffs impliedly if not expressly acquiesced in the contracts the first defendants had entered into with the defendants. Furthermore the plaintiffs had got an assignment of the balance 20% of the original purchase prices still payable by the first defendants to Prime Developments of which notice was given to the defendants who had accepted the same. Thus the plaintiffs acknowledged the defendants as sub-purchasers of the mortgaged properties and it was against all the principles of equity, notwithstanding the defendants' delay and failure to enforce their rights (whatever they were) against the first defendants, for the plaintiffs now to seek to enforce their mortgagees' power of sale.

The defendants also argued that the equitable principles of promissory estoppel and proprietary estoppel applied although in my view the facts relating to these originating summonses did not permit any such arguments to be advanced.

These novel arguments were put forward by the defendants in an attempt to prevent the plaintiffs from succeeding in their applications to have the caveats withdrawn, which was the ultimate purpose of these originating summonses, but in my view none of these arguments can succeed unless the defendants can demonstrate to the court that in law they have an interest in the land within the meaning of s 104(1) of the Land Titles Act (Cap 157, 1985 Ed) which will entitle them to maintain these caveats.

The New Zealand Supreme Court case of *Catchpole* v *Burke*[5] considered the phrase 'any estate or interest in

land' in s 41 of the New Zealand Land Transfer Act 1952 which is pari materia with s 37 of the Land Titles Act (Cap 157, 1985 Ed), and in doing so the learned judge said at p 269 of the report:

> The phrase 'any estate or interest' must include equitable estates or interests. Strictly speaking, it is therefore a misuse of language to say that an agreement for sale and purchase executed by a registered proprietor passes the beneficial or equitable estate in his land to the purchaser, because s 41 negates the proposition. What the agreement does is to vest in the purchaser a contractual right, enforceable in equity, for transfer to him of the statutory title to the land.

The first defendants were not the registered proprietors of the mortgaged properties. Further, they had assigned their equitable estate or interest in the mortgaged properties to the plaintiffs. Much less then, could the first defendants' agreements for sale and purchase of the mortgaged properties with the defendants pass such an 'interest in the land' to the defendants to entitle them to lodge caveats. All that the defendants had was a contractual right against the first defendants to transfer the statutory title in the mortgaged properties when the first defendants were legally able to do so, that is to say, when they had paid off the balance 20% of the original purchase price to Prime Developments and had redeemed the mortgage with the plaintiffs.

It is appropriate at this juncture to consider whether the defendants could have specifically enforced the sale and purchase agreements the defendants had entered into with the first defendants.

In *Central Trust And Safe Deposit Company* v *Harvey G Snider & Ors*,[6] the Privy Council observed at p 272:

> It is often said that after a contract for the sale of land the vendor is a trustee for the purchaser, ... But it must not be forgotten that in each case it is tacitly assumed that the contract would in a court of equity be enforced specifically.
>
> If for some reason equity would not enforce specific performance, or if the right to specific performance has been lost by the subsequent conduct of the party in whose favour specific performance might originally have been granted, the vendor or covenantor either never was, or has ceased to be, a trustee in any sense at all.

In these originating summonses, I have no doubt, that a court of equity would never have granted specific performance to the defendants before the first defendants had wholly or partially redeemed the mortgaged properties from the mortgage as to have done so would have destroyed the plaintiffs' security for the mortgage. I was urged by the defendants' counsel to disregard the events leading up to the plaintiffs' consent to the first defendants to sell the mortgaged properties in question given on 21 May 1987. I am afraid I cannot do this as quite clearly the consent was given on the first defendants' assurance or undertaking contained in the first defendants' telex to the plaintiffs dated 7 May 1987 (set out in full earlier in this judgment) that the shortfall in the loan moneys would be paid by monthly instalments of $10,000. Clearly the consent to sell was conditional and the first defendants have never attempted to fulfil this condition. Furthermore the defendants are guilty of gross and inordinate delay in seeking to enforce their rights, if any, under the contract of sale and purchase.

I do not overlook that the defendants in OS No 1232 of 1989 did on 4 April 1988 obtain an order for specific performance. It will however be noted that the statement of claim in Suit No 186 of 1988 did not make any reference to the mortgage. Had the statement of claim disclosed this vital fact I cannot conceive that an order for specific performance would have been made.

The conclusion is inescapable. The defendants have not acquired any interest in the mortgaged properties such that they could maintain caveats against the mortgaged properties.

The plaintiffs are entitled to the declaration they seek that they are entitled to exercise their mortgagees' powers over the mortgaged properties in question and in particular to exercise their power of sale and obtain possession of the mortgaged properties for the purposes of such sale freed from any contract of sale entered into by the first defendants with the defendants in respect of the mortgaged properties in question.

I do not find it necessary to come to any conclusion on the plaintiffs' application for the declaration that upon the plaintiffs' exercise of their mortgagees' power of sale over the mortgaged properties by entering into contracts for sale and purchase, the first defendants are not entitled to redeem the mortgaged properties. The first defendants did not appear at the hearing and I have not heard any arguments from them or on their behalf.

Accordingly I made the following orders:

(1) OS No 1167 of 1989

That the second and fourth defendants are to totally withdraw caveat CV/46137A as well as caveat CV/45313B lodged by them in the Registry of Titles on 22 July 1987 and 21 November 1990 respectively against the mortgaged property 97A by executing and lodging a duly stamped instrument of withdrawal of caveat within seven days from the date of this order.

That the second and third defendants are to totally withdraw caveat CV/6652B lodged by them in the Registry of Titles on 13 October 1989 against the mortgaged property 97A by executing and lodging a duly stamped instrument of withdrawal of caveat within seven days from the date of this order.

I will note in passing that as an argument of last resort it was argued by the defendants' counsel that

since the third defendant who had purchased this mortgaged property from the plaintiffs at the auction had now withdrawn from the purchase, the caveats should not be ordered to be removed as there was no mortgage sale in prospect, relying on a dicta of Chan Sek Keong J in *United Overseas Finance Ltd* v *Mutu Jeras*[6] at p 25. I am persuaded by the New South Wales Supreme Court decision, *Kerabee Park Pty Ltd* v *Daley*[7] which, inter alia, held that a caveator was not justified in maintaining his caveat, when requested by a mortgagee to withdraw it for the purpose of promoting a successful mortgagee's sale, if the caveator cannot establish that the mortgagee was, or might be, going to exercise his powers improperly; or that he might fail to apply any surplus proceeds in the manner required by law. Apart from the fact that there is no suggestion of impropriety on the part of the plaintiffs, the facts in *United Overseas Finance Ltd* v *Mutu Jeras*[6] are distinguishable from the facts in *Kerabee Park Pty Ltd* v *Daley*.[7]

In my view the filing of these caveats by the second, third and fourth defendants was frivolous and vexatious and all three caveats ought to be removed forthwith notwithstanding that the plaintiffs' application relate only to caveat CV/46137A which was defective in any case.

I also order that the second, third and fourth defendants pay the costs of the plaintiffs.

(2) OS No 1231 of 1989

That the second and third defendants are to totally withdraw caveat CV/33703A lodged by them in the Registry of Titles against the mortgaged property 99A by executing and lodging a duly stamped instrument of withdrawal of caveat within seven days from the date of this order.

I order that the second and third defendants pay the costs of the plaintiffs.

(3) OS No 1232 of 1989

That the second and third defendants are to totally withdraw caveat CV/55908A lodged by them in the Registry of Titles against the mortgaged property 101A by executing and lodging a duly stamped instrument of withdrawal of caveat within seven days from the date of this order.

I order that the second and third defendants pay the costs of the plaintiffs.

Application allowed.

Solicitors: *Ramdas & Wong; BT Tan & Co.*

Reported by *Teoh Ai Lin*

BEP Akitek (Pte) v Pontiac Hotel Pte Ltd

HIGH COURT (SINGAPORE) — SUIT NO 5326 OF 1983
KARTHIGESU J
29 NOVEMBER 1990

Civil Procedure — Pleadings — Counterclaim — Amendment — Amendment raising new claim — New claim statute-barred if commencing from date on which application was made — Date from which amendment becomes effective — Rules of the Supreme Court 1970, O 20 r 5(1), (2) & (5) — Limitation Act (Cap 163, 1985 Ed), s 31

Civil Procedure — Amendment — Amendment to counterclaim raising a new claim — New claim statute-barred if commencing from date on which application was made — Date from which amendment becomes effective — Rules of the Supreme Court 1970, O 20 r 5(1), (2) & (5) — Limitation Act (Cap 163, 1985 Ed), s 31

The plaintiffs were consultant architects for the defendants' project. They claimed under an agreement the balance of their professional fees in the sum of $415,893. Summary judgment was entered for part of this sum, liability for which was admitted by the defendants, but execution was stayed pending the trial of the defendants' counterclaim. The defendants delivered their defence and counterclaim. On 25 October 1989, the defendants applied to amend their defence and counterclaim, inter alia, by pleading a new claim by way of a counterclaim. The application was allowed by the assistant registrar who ordered that the amendments take effect from 25 October 1989. The defendants appeal against the part of the order that the amendments should take effect from 25 October 1989. The question before the court is whether the court has a discretion when a new claim which is statute-barred is pleaded by way of an amendment to a counterclaim to order that it takes effect from a date other than the date of commencement of the original action.

Held, allowing the appeal:
The court has no discretion to order that the date of the amendment takes effect from a date other than the date of commencement of the original action as s 31 of the Limitation Act (Cap 163, 1985 Ed) deems such a claim to have commenced on the same date as the action in which the set-off or counterclaim is pleaded. Section 31 overrides any discretion given to the court by para (1) of O 20 r 5.

Cases referred to
1 *Brickfield Properties Ltd* v *Newton* [1971] 3 All ER 328 (refd)
2 *Chatsworth Investments Ltd* v *Cussins (Contractors) Ltd* [1969] 1 All ER 143 (refd)
3 *Ketteman & Ors* v *Hansel Properties Ltd* [1987] 2 WLR 312; [1988] 1 All ER 38 (distd)
4 *Liff* v *Peasley & Anor* [1980] 1 WLR 781; [1980] 1 All ER 623 (refd)
5 *Liverpool Roman Catholic Archdiocesan Trustees Inc* v *Gibberd & Ors* (1987) 7 Con LR 113 (distd)
6 *Liptons Cash Registers & Business Equipment Ltd* v *Hugin (GB) Ltd & Ors* [1982] 1 All ER 595 (distd)

Legislation referred to
Limitation Act (Cap 163, 1985 Ed) s 31
Rules of the Supreme Court 1970 O 20 r 5